



U.S. Department of Justice

Environment and Natural Resources Division

BSG:AML
DJ No. 90-11-3-1620/2

Environmental Enforcement Section
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August 23, 2002

VIA EMAIL, TELECOPY, AND REGULAR MAIL

EPA Region 5 Records Ctr.



275102

David E. Northrop, Esq.
Porter Wright Morris & Arthur
41 S. High St.
Columbus, OH 43215-6194

Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Response to Settlement Proposals of June 10 and June 27, 2002

Dear David:

This letter is in response to your letters of June 10 and June 27, 2002, in which you tender a settlement offer on behalf of your client, Aeronca. I apologize for the delay in getting back to you, but as you are aware, I have been busy taking depositions in this matter with respect to defendants other than Aeronca. Hopefully, we can move this settlement on the "fast track" now.

The United States appreciates your client's increased offer, and the formula that you used to arrive at it. Nevertheless, several immediate problems with your client's offer stand out: (1) the "inputs" regarding the United States' costs and the Work Group's costs are incorrect; (2) the offer fails to include a 40% premium that all "cash out" participants have paid; and (3) the offer fails to take into account the fact that the United States cannot ignore that your client -- unlike tens of other defendants -- has forced us to litigate this matter. I turn to each of these points.

One. While I do not have an exact figure on the United States' outstanding past costs, two years ago, these past costs were \$4.3 million. Based on my knowledge of and experience with CERCLA costs, accounting, and interest, a current print-out of the United States' past costs would exceed \$5 million. That is the minimum number that the United States is willing to claim in negotiating with Aeronca (or any other potential settler).

With respect to the Work Group, they have advised me that their costs -- excluding any contingencies -- now stand at \$12.75 million.

Thus, excluding all contingencies, the total costs on this Site are \$17.75 million.

Two. As you are aware, when the Work Group negotiated the “cash out” settlements with the settling PRPs on this Site, the Work Group attached a 40% premium to a settler’s allocated share. Given your CERCLA experience, you know that a “premium” for cash-out settlers is common and routine. Sometimes these premiums exceed 100%. In this case, the Work Group asked for only 40%. Such a premium is more than fair. Among other things, the Work Group has taken the risk of performing the remedy at the Site and bearing the burden of non-paying Work Group contributors (of which there are some; for example, Formica filed for bankruptcy). While Aeronca has some cash flow issues that may justify a payment schedule for any settlement, Aeronca’s financial situation simply does not justify waiving the 40% premium.

Three. As you are aware, the United States has a strong policy of not rewarding PRPs who fail to accept their liability when a pre-litigation settlement is offered to them. Only a couple of circumstances justify a downward adjustment to a pre-litigation settlement demand: (1) ability to pay issues; and (2) weak evidence. With respect to Aeronca and the ability to pay question, Aeronca does appear to have cash flow issues that require some downward adjustment of the United States’ last offer. However, that adjustment primarily can take the form of a payment schedule; only a small part of it need take the form of a reduced demand. As to the liability evidence against Aeronca, the United States believes that it has a strong case against Aeronca.

With these points in mind, I am willing to recommend to the appropriate officials here in DOJ and EPA a settlement along the following lines. The total settlement amount would be \$552,000, payable in twelve quarterly installments of \$46,000, but each installment payment (after the first payment) would include interest at the Superfund rate on the total principal balance then due. The Consent Decree also would include a formula by which Aeronca would agree to pay the Work Group 2.983% of any future contingencies that the Work Group incurred; the amount of possible future contingencies that the Work Group could seek this percentage of would be capped. The settlement would have to be embodied in a Consent Decree with standard CERCLA terms and conditions.

The United States arrived at the total amount due using the following formula:

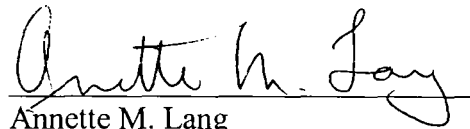
- (1) \$17.75 million (total costs) multiplied by 2.13% (allocator’s finding) equals \$378,075.
- (2) \$378,075 - \$47,000 (amount Aeronca previously contributed) equals \$331,075.
- (3) \$331,075 multiplied by 1.4 (40% premium for cash-out) equals \$463,505.
- (4) \$463,505 multiplied by 1.2 (20% premium for not settling sooner) equals \$556,206.
- (5) We then rounded \$556,206 down to \$552,000 to get a total sum that when divided by 12 gave a round number (i.e., \$46,000).

The United States arrived at the percentage of any contingencies that Aeronca would have to pay to the Work Group by multiplying 2.13% by 1.4 (the 40% premium).

As you will note, \$552,000 is 15% less than the previous demand by the United States (\$652,000). Considering that the liability evidence against Aeronca has gotten stronger since the United States made its last demand, we hope that Aeronca gives serious consideration to the demand made herein. While the United States has some limited flexibility with respect to this demand (particularly -- if the Work Group agrees -- to the duration of the payment schedule), our flexibility is not unbounded.

Thank you for your consideration of these matters and I look forward to hearing from you soon.

Sincerely,

A handwritten signature in cursive script, reading "Annette M. Lang". The signature is written in dark ink and is positioned above a horizontal line.

Annette M. Lang
Trial Attorney

cc: Craig Melodia (via email and regular mail)
Mike O'Callaghan (same)